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**Final Report of the  
Michigan Supreme Court  
Task Force on Gender  
Issues in the Courts**

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December, 1989

## **VI. DOMESTIC RELATIONS**

A large amount of public and written testimony, as well as the judicial, attorney and court user surveys and numerous articles and treatises, spoke to the impact of gender bias on the divorce process. Notwithstanding the fact that the vast majority of domestic relations cases are settled by the parties without trial, men and women attorneys, other professionals and citizens spoke of the frustration, anger and personal cost attendant to the divorce process. It was apparent that much of their concern reflected their perception that men and women are treated differently in the divorce process on the basis of stereotypes about their natural roles in marriage and misconceptions about their status in society.

To address adequately the issue of gender bias and justice in the domestic relations area, it is important to consider three factors: 1) the underlying assumptions about men and women as partners in marriage; 2) the economic realities facing women in society; and 3) the underlying attitudes within the court system toward the domestic relations process.

### **Marriage as a Social Partnership**

Strong cultural traditions define the institution of marriage and assign roles and remen and women therein. The divorce process is profoundly influenced by these traditions. Many judges, lawyers and litigants are also deeply affected. Because discretion plays a major role in the divorce process, their attitudes may exert a powerful influence upon decision-making.

Stereotypical attitudes about the divorce process include the view that the woman in marriage is essentially a caretaker, parent, nurturer, homemaker and wife. A woman's conduct is measured against the yardstick of "wife and mother". A direct corollary to this view of women is that men are less desirable parents. Women are seen to be naturally qualified as mothers and wives, but men are not viewed as naturally qualified fathers and husbands. The result is that the woman's sphere of influence is limited to the domestic domain, while men are thrust into the outside world as protector, defender, breadwinner.

### **The Economic Status of Women**

Many divorce law reforms have occurred in the United States in recent years. While many states, including Michigan, have eliminated fault as an issue in divorce, the question of economic equity for women remains. There is evidence that current domestic relations decisions may not take into account the long term economic effect of divorce on wives and children and the increasing reality of the "feminization of poverty" in society.

In 1988, 33.5% of female heads of household with no husband present were at or below the poverty level, in contrast to 5.6% of married couple families. The median income of female heads of households with no husband present was \$15,346, as opposed to \$36,389 for married-couple families.' Additionally, the number of female-headed households has increased dramatically over the last 25 years.

Divorce has become much more common over this period, and the number of never married women with children has also risen. Consequently, the number and proportion of families maintained by persons - mostly women - with no spouse present rose to 13.8 million or 21 % of the total.'

In a 1987 study on the status of women in Michigan, University of Michigan sociologist Dr. Rosemary Sarri reported that women in Michigan in unprecedented numbers are rearing children alone, with inadequate or no child support, earning little more than half what men earn and

experiencing a steady decline in government benefits. She reported that women and children constitute 70 % of Michigan's poor.<sup>3</sup>

Various factors significantly contribute to the hardship experienced by divorced women. The first is that women usually remain responsible for the emotional support and care of the children. The mother is typically the primary parent and after divorce that pattern continues. Childbearing and child care responsibility affect an individual's earning capacity. According to a study of the effect of parenthood on the career and job choices of young adults, the proportion of women employed drops dramatically upon the birth of a first child; two years later the proportion of females employed is 40% lower than what would have been predicted in the absence of childbirth. Prior to the childbirth, approximately 85% of the married women in the study would have been expected to be employed, while only 45% were expected to be employed following childbirth.<sup>4</sup>

Compared to the effect of parenthood on the careers of mothers, the impact of parenthood on the careers of fathers is slight. Following childbirth, the father's wages and earnings closely resemble that which would have been predicted had there been no children. The slight decline in the father's earnings contrasts sharply with the one-third decline in the mother's earnings (which earnings were significantly lower from the outset). Thus, parenthood is associated with a major decline in the employment and expected earnings of mothers, but not in the employment and expected earnings of fathers. This difference raises important public policy questions if mothers are expected to support themselves (and their children) after divorce.<sup>5</sup>

In testimony presented to the Task Force by a single mother supporting three children, the dilemma of family and career was vividly illustrated:

Men and women are not equal in the work force in their ability to control their time during working hours. The reality is in the working world I cannot devote 50 or 60 hours a week to a profession which would bring me a competent income to support three children. I cannot do night shifts, weekends or moonlight. All the health care, physical, dental, and mental health services are available mostly during working hours. I have to take time off regularly to meet these obligations.<sup>6</sup>

A second factor in women's economic decline after divorce is financial responsibility for children. According to the 1985 US Census, despite child support orders in the majority of divorce cases, sixty-three percent of absent fathers paid no child support; twenty-four percent comply fully with support orders; and the remaining fifteen percent pay irregularly.<sup>7</sup> Few support orders provide for automatic cost-of-living increases and fewer recognize that child-rearing costs rise as children get older.

A third major factor is the continued gender inequity in the work place. Fully-employed women tend to earn less than fully-employed men. In a comparison of relative income across the nation, the following chart compares the mean 1985 earnings of females and minority groups as a percentage of majority men's earnings.

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TABLE VI-1: 1985 MEAN ANNUAL EARNINGS AS PERCENT OF WHITE MALES'

White Males	\$28,159	100.0%
Black Males	19,949	70.8%
Hispanic Males	19,692	69.9%
White Females	17,253	61.2%
Black Females	15,459	54.8%
Hispanic Females	14,576	51.7%

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There are several factors which can account for this significant wage gap. Two out of every three women in poverty are unemployed. Of those families with children in poverty, 50% are headed by a female high school dropout.<sup>8</sup> Women maintaining families have more than double the jobless rate of husbands or wives.<sup>9</sup>

According to the U.S. Department of Labor, women workers in 1988 were divided into the following occupational categories:

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**TABLE VI-2: WOMEN ARE CONCENTRATED IN LOW PAYING JOBS**

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All Occupations	41.9%
Childcare Worker	99.4%
Secretary, Administrative Support	99.2%
Receptionist	97.2%
Typist	94.5%
RN	92.7%
Bank Teller	91.0%
Cashier	79.3%
Waitress	77.0%
Teacher	70.3%
Sales, Counter Clerk	70.2%

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These ten occupations account for 8,076 women, 27.0% of the women in the paid workforce.

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As one witness testified:

(There is) gender bias in the work world. Although \_ an undergraduate degree from the University of Michigan, my MBA from the university of Michigan-Flint, I am still unable to break through what my husband made with two years of college education.”<sup>10</sup>

Another factor in the wage gap is that even when women have access to similar jobs and responsibilities as men, they tend to earn less for comparable work. An example of this phenomenon can be found in the following 1985 statistics illustrating sex-based wage discrimination where salaries are based on the sex of the worker and not on the skills required for the job.

Finally, several indirect factors influence the economic status of women after divorce. Women must frequently take part-time employment in clerical and sales positions, most with no benefits. Women in poverty are often forced to choose between working at low wage jobs -without health benefits - and going on welfare, which provides Medicaid benefits. Many women choose the avenue which is most likely to provide health care for their children.

### **Attitudes Towards Domestic Relations Within the Court System**

Judges and lawyers testified that the area of domestic relations should be elevated in importance in the legal system. Concern was expressed that judges are reluctant to hear domestic cases. Both lawyers and judges were sometimes viewed as forcing settlements, prolonging cases and postponing decisions because of the “difficult and distasteful” nature of a contested divorce. Similarly, concern was expressed about the lack of in-depth knowledge some attorneys display in the domestic relations field.

Concern was also expressed about the availability of adequate attorney fees to make it possible for the financially disadvantaged to litigate their claims properly. A number of experienced domestic relations attorneys expressed the view that representation of male clients is both easier and more lucrative. Where decisions are delayed and a “siege mentality” prevails, the financially weaker party is distinctly disadvantaged. Attorneys may then be pressured to settle matters on terms far less desirable than would result if the issue were litigated.

Many attorneys expressed concern that the appellate courts in Michigan have not established clear direction with respect to a number of unresolved domestic relations issues. They observed that Supreme Court reluctance to take domestic relations cases and Court of Appeals decisions which are inconsistent or unclear further confuse the trial courts and foster wide disparities in the application of existing law.

The domestic relations docket in Michigan is a major part of cases. Yet many statements were made to the Task Force about the inadequate funding and low priority afforded these cases by the system. Finally, the members of the Task Force attending the public hearings were struck with the degree of confusion and misinformation shown by men and women participating in divorce proceedings. Many individuals appeared to have received inadequate information concerning the process itself and to have unrealistic expectations about the ability of the courts to resolve their problems.

## **ALIMONY**

### **Statutory Basis for Alimony**

The Michigan statute governing the payment of alimony provides:

Upon entry of a judgment of divorce or separate maintenance if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage are as committed to the care and custody of either party...[alimony may be paid to either party]... in gross or otherwise as the court considers just and reasonable after considering the ability of either party to pay and the character and situation of the parties and all other circumstances of the case.<sup>11</sup>

These criteria were supplemented in *Parrish v. Parrish*<sup>12</sup>, 138 Mich App 546 (1984), in which the Michigan Court of Appeals confirmed the following factors which should be considered in determining whether alimony should be awarded:

- 1) the past relations and conduct of the parties;
- 2) the length of the marriage;
- 3) the ability of the parties to work;
- 4) the source of and amount of property awarded to the parties;
- 5) the age of the parties;
- 6) the ability of the parties to pay alimony;
- 7) the present situation of the parties;
- 8) the needs of the parties;
- 9) the health of the parties;
- 10) the prior standard of living of the parties and whether either is responsible for the support of others; and
- 11) general principles of equity.<sup>13</sup>

A review of the statutes and case law pertaining to alimony does not provide clear and unequivocal guidance. The relevant considerations are interrelated and the relative weight or importance placed on one over another is solely within the discretion of the trier of fact. No judge is required to make a separate finding for each factor. The judge is only required to provide a basis for the decision on the record. Thus, awards of alimony entail significant judicial discretion and individual judgment. One witness provided the following example:

After hearing this case, (the judge) awarded me, the plaintiff, \$25,000 yearly for 10 years in addition to an equal division of property which included my inheritance from my parents. Based upon my belief that some of the testimony was in error, I appealed the decision and the appellate court modified the decision and increased the alimony award to \$50,000 annually for 10 years. The defendant then appealed to the State Supreme Court which reversed the decision of the appellate court, allowing the original judgment to stand. That decision was based upon the belief, to paraphrase, that (the judge) “did not abuse his discretion and that to overturn his decision would undermine the authority of the Circuit Court.”<sup>14</sup>

### **Factors Which Influence the Award of Alimony**

The economic impact of divorce is very different for men than it is for women. As detailed above, national and Michigan data demonstrate that women experience a significant decrease in their standard of living after divorce. Although divorce can impose severe economic hardship on both parties where the family’s financial resources are limited, data show that in most instances the standard of living for men improves after a divorce, and where it does not improve, the decrease is less than that experienced by similarly situated women.

. . . (D)uring the 1970’s, most states introduced laws assuring the equitable distribution of property. These laws effectively got rid of alimony, replacing it with a proper? settlement. The net result has been to make divorce much less expensive for men.<sup>15</sup>

Concerns about alimony include the infrequency of awards and the reluctance of some judges to award permanent alimony. A California study found that eighty-five percent of divorced women were not awarded any alimony.<sup>16</sup> A similar study in Massachusetts revealed that the percent of women who do not receive alimony is between ten and twenty percent.<sup>17</sup> Nationwide, only 12.4%

of those divorced between 1980 and 1985 were awarded alimony.<sup>18</sup> The reluctance to award permanent alimony was graphically illustrated by the perceptions of the former wife of a professional man:

Permanent alimony was not an option with (my judge) in spite of the fact that I was married over 25 years, seven children, no more than a high school education and had never worked out of the home.<sup>19</sup>

She explained that she entered into a divorce settlement which provided for five years of alimony, at the end of which she was left with limited career options and no likelihood of again experiencing anything close to her previous lifestyle.

An experienced Michigan domestic relations attorney told the Task Force:

Alimony is awarded in very few cases, less than twenty percent... And the number of cases in which it is being awarded is getting smaller and smaller. The alimony period, the length of time during which an award is made is getting shorter and shorter. And unfortunately, the amount of alimony is getting smaller and smaller.<sup>20</sup>

The child support guidelines may also inhibit the award of alimony. Judges and attorneys may conclude that the guidelines represent the upper limit of required financial contribution and will, therefore, be unwilling to order additional payments. This assumption that child support is an adequate substitute for alimony adversely affects the custodial parent who postpones career opportunities to raise the children and is left with no marketable skills and no source of income when the children reach majority.

Another reason that some judges are reluctant to award alimony is their erroneous assumptions about a woman's ability to survive economically after divorce. These assumptions include: Women are likely to remarry and will be supported by another husband soon after the divorce; women will be able to enter the workforce and achieve income parity with their male counterparts; and alimony fosters a negative dependency and is a bar to a woman's initiative and ambition. Therefore, its use should be limited to a temporary stopgap while the woman obtains enough education to qualify herself for a job.

This rationale is reflected in *Ozdaglar v Ozdaglar*, which upheld the trial court's determination that the property award was sufficient to meet the needs of the spouse until such time as she was able to supplement the award with earnings from employment after "updating her skills".<sup>21</sup> In contrast, in *Zecchin v Zecchin*, the Court of Appeals observed that the wife "should not have to dissipate her marital assets and become impoverished during the two-year rehabilitation period." The appellate court directed the trial court to redetermine the minimum alimony originally awarded and to determine the amount "reasonably necessary" for the wife's support and education during the two-year period. Further, it directed the trial court to review the alimony award at the end of the period because "in spite of her best efforts" the wife may be unable to support herself fully "because of her age and relative lack of marketable skills".<sup>22</sup>

Yet, according to a lawyer practicing in the field, inadequate alimony awards persist:

The judges in the \_\_\_\_\_ area have said to me and I can't tell you in how many cases: What does your client look like? What does my client look like? A sixty year old woman... [she should] be able to get another husband and subsequently should need alimony for a shorter period of time, and [the judge] will not be so tough on the husband...Judges ignore the effect of ageism and sexism in the marketplace. There is a double whammy ,...and the support awards are almost always

inadequate to support them if forced to go into the work place faced with sex discrimination, sixty cents on the dollar for every dollar that a man earns. So they are faced with inadequate support to supplement inadequate wages.<sup>23</sup>

Another factor which impacts the award of alimony is the failure of some judges and attorneys to acknowledge and value the real and tangible contributions made by a homemaker to the survival, benefit and growth of the family unit. One such contribution may be the sacrifice of her career opportunities. This was vividly illustrated in testimony concerning the plight of an older homemaker, faced with divorce after a lengthy marriage:

I made a commitment to my husband to do all those things which would not only make possible but would enhance his rapid and successful ascent in the business world.

As a result of this agreement between my husband and myself, I refrained from even contemplating the possibility of a career ...Thus, in the division of responsibilities, mine not only embodied the care of our five children and the keeping of our home, but included being prepared for the constant and demanding obligations of a corporate wife. In a way it was like any business partnership... However, unlike a business, where each partner has the opportunity to develop particular skills... it is not possible for a wife to develop marketable skills due to a lack of time and opportunity.<sup>24</sup>

### **Enforcement**

According to the U.S. Census Bureau, the rate of compliance with alimony orders is very low. In 1985, only 43% of the women who were awarded alimony received the full payment due; 27% received no payment at all.<sup>25</sup> These percentages are substantially similar to compliance rates for child support payments. Yet, the collection initiatives and national policies established to provide child support payment enforcement have not been duplicated with respect to alimony collection. Few national or state efforts have been put in place to further court efforts to enforce alimony orders.

Women who are being denied court-ordered alimony face a long, frustrating, expensive and often fruitless battle to collect. One woman told the Task Force that she had filed for alimony enforcement in pro per over a year earlier and by the time of the hearing had found it necessary to pay an attorney \$5,000 in an effort to collect an arrearage of \$3,000.<sup>26</sup>

### **Principles That Should Govern the Award of Alimony**

The Task Force concludes that several principles should govern the award of alimony. First, alimony should be based on the gross income of the parties and not merely on their salary income. The court should take into account dividends, pensions, deferred income, bonuses and other sources of income. Total income represents the full fruit of the couple's labor and equity demands that each should share in the totality of what they have worked together to achieve.

Second, alimony should be based upon the amount of money available, not merely on the basic needs of the recipient. There is no justification for limiting one spouse to essential needs while the other enjoys a significantly higher standard of living. Where both have contributed to the whole, each should enjoy equally the benefits of their contributions.



The award of alimony is very much a function of the beliefs, attitudes and assumptions held by the individual judge. This broad judicial discretion, tempered only by a clear abuse standard, results in a system in which there is little predictability or consistency.

## **PROPERTY**

Property division in a contested divorce is a discretionary function of the courts. Under current law “the end sought in the division of property is a fair and equitable distribution under all the circumstances. The division is not governed by any rigid rules or mathematical formulas”.<sup>27</sup> As has been described in the previous sections, the exercise of this discretion is often shaped by the beliefs and experience of the judge on such matters pertaining to domestic relations as:

view of marriage as an economic partnership;

understanding of the economic consequences to the parties resulting from the dissolution of the marriage;

attitudes about the proper role of men and women and the value of women’s contributions to the marriage; and

recognition of the unequal bargaining position that women may have in the divorce process and its financial and emotional consequences.

To the extent that these factors are misunderstood, ignored or denied, gender-based treatment may inappropriately influence property division.

### **Career as Major Asset of the Marriage**

Several witnesses advised the Task Force that when assets are divided, courts do not regularly take into account the career of the wage-earning spouse (the husband in most instances) as the single most valuable asset of the marriage. College degrees, apprenticeship training, skilled trade status, business acumen and career longevity and success are all contributors to the marketability and long term solvency of the husband. If this asset is factored out of the property decision, the wife is often left in a position where she is required to utilize her property distribution as a source of on-going support. The husband, however, can continue to utilize his career for his further advancement and to live on the wages it generates. To the extent that a wife has postponed her own career in order to provide a home and family for her spouse while he develops his career, she is further denied an equitable share of the very asset she has helped create.’ Women contribute to the overall value of the marital estate as partners in a joint venture. The consequences of the actions taken in furtherance of that contribution frequently cannot be accommodated through a 50/50 split of the present value of that partnership unless both the career and pension of the wage earning spouse are taken into consideration.<sup>28</sup>

**TABLE VI-3: Disposition of Property**

Question: When judges divide the marital property, there is an assumption of a 50/50 split of all assets.

(n=157)	Always & Usually	Sometimes	Seldom	Never	No Basis for Opinion
<b>Female</b> (n - 78)	48%	28%	17%	0%	6%
<b>Male</b> (n=79)	76%	14%	3%	3%	5%

### **Family Businesses**

Many women testified before the Task Force that the courts had totally precluded them from any interest in the family owned business. These decisions may have several consequences. The women lose their jobs with the divorce, and in many cases, because they have not been paid for their work, they lose any social security benefit arising from the years of work.

**TABLE VI-4: Disposition of Property**

Question: When judges divide the marital property, there is an assumption that if a business is involved, it goes to the husband.

(n = 157)	Always & Usually	Sometimes	Seldom & Never	No Basis for Opinion
<b>Female</b> (n = 78)	50%	18%	6%	26%
<b>Male</b> (n = 79)	40%	24%	18%	19%

A further variation on this theme was reported by several women. They not only lost their position and interest in the family owned business, but they also were enjoined from competing against their ex-husbands by pursuing their careers and skills in the geographic area in which they resided. Such a “restraint of trade, non-competition order” has been upheld by the Michigan Court of Appeals.<sup>30</sup>

### **Discovery**

Attorneys who spoke to the Task Force about property issues in domestic relations cases strongly complained about the difficulties inherent in discovery and the absence of any meaningful consequences to a party who wrongfully hides assets. One experienced domestic relations practitioner told the Task Force that he would rather represent five men than one woman because “It is so much easier.” The man holds fifty-two carrots, and the woman’s lawyer, if he or she is good, finds forty on discovery, so that the wife receives twenty. In many marriages, the wage-earning spouse is in a position to have more information about the nature and extent of the assets, more advanced warning about the likely dissolution of the marriage and greater ability to manipulate those assets so that they will not be included in the marital package.<sup>31</sup>

### **Relationship Between Property and Custody Decisions**

Another concern voiced to the Task Force by many court and legal professionals was that resolution of economic issues in divorce was often held “hostage” to demands for custody.” Where custody demands are advanced merely as bargaining devices, the woman who wants to keep her children may be disadvantaged. She can be forced to agree to economic concessions out of fear of losing custody. Judges, lawyers and court staff should be aware of the possibility of this happening and attempt to separate the various issues arising out of divorce.

## CHILD SUPPORT

Extensive testimony received by the Task Force demonstrated that child support often falls below the amount necessary for the needs of the child. Plainly, divorced parties and their children cannot continue to live at the same cost in separate households as they could as a single family unit. However, while married men generally spend most of their income on their families, after divorce they retain the lion's share and use it to establish a new life. This puts a wife who has custody of the children in the disparate position of having to make up that financial loss. One individual stated that in the seven years since she had been divorced, she had been unable to effectuate a standard of living for herself and three children comparable to that which the family had when intact.<sup>33</sup>

An analysis of women surveyed in the 1985 Survey of Income and Education and the 1979 Supplement to the current Population Survey revealed that only twenty-five percent and thirty-five percent, respectively, of demographically eligible women received some child support payments. In cases where support was ordered, the average order amounted to only about seventy percent of the poverty standard and only about one-fourth of the estimated normal level of expenditures on children within intact families.<sup>34</sup>

The Task Force's attorney survey indicated that only eight percent of female attorneys and twenty-eight percent of male attorneys believed that child support awards usually reflect a realistic understanding of the local costs of child rearing.

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**TABLE VI-5: DOMESTIC RELATIONS**

### Child Support

Question: Child support awards reflect a realistic understanding of the local costs of child rearing.

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	Always and Sometimes	Seldom	Never	No Basis For Opinion	
(n = 153) Usually					
Female (n = 77)	8% *	16%	36%	34%	6%
Male (n = 76)	28% *	30%	36%	4%	3%

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\* "Always" response = 0%

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Experienced domestic relations practitioners tested that the Michigan Child Support Guidelines as originally structured do not take into account the actual cost of raising children. They contended that the committee that developed the Guidelines started by looking at the expenses of an intact family with two parents providing for the children. This did not take into consideration the

additional costs incurred when a separate family unit is formed with only one adult caring for the children. As a result, the following items were omitted in calculating the costs of raising children:

...Savings, the price of the payment of the principal on a home, in which the children lived. Insurance, payments on credit, none of these things were included as part of cost for children. In the process I found that the overriding concern although it was stated that we were concerned about the well-being of the children and providing children with adequate income, adequate support, the procedure was to start with a home in existence. And then we added on cost so that we don't look at a home and say a part of this goes to the child. Instead, we say we have an existing household. If we add a child, what is the increase in cost? We have things like electricity, maybe the home is bigger, maybe it isn't. That is how the support was determined."<sup>35</sup>

The Court of Appeals in *Kalter v Kalter*<sup>36</sup>, and *Haefner v Bayman*, assumed that the custodial parent has and pays for the home and basic services independently of the children. Therefore, she may not receive child support to compensate for any of those costs. In a discussion of the *Kalter* decision, one witness told the Task Force:

(In *Kalter* we find the issue of the hidden alimony. And it concerns that if too much money is given, it is going to mean that the custodial parent is receiving this hidden alimony. Now, the Court in (*Kalter*) stated that the mother's expenses for the car, condominium, utility, insurance should not be considered as half for her son. She had to have [these items] anyway and therefore should not be considered as needs for the child. The total, and in that case (*Kalter*), also the father earned two hundred thousand dollars. Child support was set at eight thousand dollars a year. And that was felt to be more than sufficient. I think we are dealing with a real sexist attitude here in dealing with the issue of child support. I think often we are dealing with Judges who have no idea of the cost of raising children.<sup>37</sup>

Inadequate support awards are as much of a problem as lack of enforcement. According to one authority:

It is relevant to note that although the bulk of the federal and state efforts are directed at improved enforcement measures, it has been estimated that the amount of money lost as a result of inadequate orders is five times as great as the amount of money lost as a result of the failure to collect ordered support. The deficiency in child support orders as well as the absence of systematic updating procedures for orders in effect.<sup>38</sup>

According to testimony presented to the Task Force child support guidelines are often treated as the maximum amount to be awarded or are not followed. The guidelines are treated as a cap or a "high water mark". In the *Kalter* case, the trial court set the level of child support below the child support guidelines. The Court of Appeals affirmed. It commented that "guidelines and percentages used without limitation are unrealistic and unfair when both parties have substantial income".<sup>39</sup> In this case, the wife's annual income was \$33,500 and the husband's was -\$200,000. The Court observed, "At some point, too much money can be bad for a child."<sup>40</sup>

## **Enforcement of Child Support**

Establishing the child support obligation and enforcing payment too often are left to a custodial parent who may already have spent much time and money on enforcement and collection. When long periods of time elapse during which no support is received, the children are likely to suffer real deprivation.

The Task Force heard testimony from women and their attorneys describing the unreasonable number of appearances they were required to make to obtain and enforce support awards. For many this jeopardized the woman's job because of the many absences from work. The following testimony was received about the Friend of the Court.

No review of cases is made without initiating from the outside. To try to get a response from a caseworker requires me to call back at least three or four times during working hours. When you want to -- when you want to get some satisfaction from them, you need to make an appearance usually, and it's the women who do not already have the support have to go to the Friend of the Court or have to make the -- hire a lawyer to go back into Court to get some sort movement on a child support agreement. I would suggest that some kind of system be instituted where Friend of the Court regularly reviews child support without having the women -- put the burden on the women or a mother to come in and point out what's going on.<sup>41</sup>

Testimony in another case concerned child support arrearages which, at the end of a nine-year period, totaled \$20,000. Seven adjournments occurred in one three-month period.<sup>42</sup>

The enactment of the federal Child Support Enforcement Program in 1975 represented a significant step forward in the national initiative to address the problem of non-payment of child support. Its purpose was to provide services aimed at locating absent parents, establishing paternity and setting and enforcing the support obligations. The Act put in place some new tools to assist states in enforcing child support orders and required that the state use a number of other enforcement techniques, including mandatory wage-withholding, liens against real and personal property, state tax refund withholding, consumer credit reporting, bond provisions and expedited court processing of enforcement matters.<sup>43</sup>

On September 11, 1988 the Committee on Ways and Means issued an evaluation of the child support enforcement programs throughout the nation. Michigan was one of four states awarded an "A" rating on the basis of performance in five areas: paternity establishment, child support collections, cost effectiveness, interstate collections and AFDC cost reductions. The Michigan State Courts Annual Report, 1988 shows a total 92% collection rate for support ordered.

Despite Michigan's success as measured by the performance of other states, significant problems concerning the award and collection of child support were revealed to the Task Force. Much progress, both legislatively and judicially, has recently been made, and currently many new procedures are being put in place which are designed to alleviate these problems. Some of these new developments include:

The guidelines themselves are being revised.

The Family Support Act of 1988 requires that the guidelines constitute a rebuttable presumption in setting child support.

Since July 6, 1987, retroactive modification of support has been prohibited.

Plan for allocation of child care expenses between the parents proportionate to their income is being implemented. This will remove the entire burden of child care costs from the custodial parent.

The Support and Visitation Act as amended now provides for an automatic order of income withholding.

## **CHILD CUSTODY**

The Task Force received a considerable amount of material from both men and women suggesting that gender bias or certain expectations associated with gender result in unequal treatment in the disposition of custody disputes. It is the opinion of the Task Force that determinations of child custody are among the most important, difficult and demanding aspects of a judge's responsibility. Judges are required to exercise their discretion based on the "best interest of the child" standard. Stereotypes about the traditional roles of men and women as parents may hinder the application of the "best interest" standard and adversely affect the children, as well as one or both of the parents involved in the custody dispute.

### **Perceptions of Unfairness Toward Fathers**

Fathers and advocates for fathers expressed to the Task Force frustration over custody disputes. A substantial amount of public testimony suggested that fathers are sometimes denied custody solely on the basis of their gender, because of "social values which uphold the supposed greater importance of maternal care and ...the legal realities which demonstrate custody is rarely granted to fathers unless the mother is grossly unfit."<sup>44</sup> In other words, "society has concluded that mothers are better equipped biologically and psychologically than fathers for nurturant parenting".<sup>45</sup> This perception is reflected by some judicial decisions and remarks in child custody cases. One witness recalled a judge blatantly suggesting that girls belong with their mothers up "until the time the daughter is ready to walk down the aisle."<sup>46</sup> In a similar case, a judge during a custody dispute went on the record as saying, "I don't buy that the father is better for a 22-month old girl than the mother. And I can't swallow it. I'm going to vomit on it. I can't handle it."<sup>47</sup> Another father noted, "I am discriminated against simply because I am a man. I am not considered to be an equal parent."<sup>48</sup>

Fathers and advocates for fathers suggested that the courts often perceive the role of the father as one which merely provides economic support. One frustrated witness described the courts' view of him as such: "I am not a father. I'm a wallet. I'm a bank account. I'm a working machine. I'm not a father."<sup>49</sup> Another father stated that, "the best interest of the children does not mean, 'daddy pays mommy', but rather both parents take parenting responsibility."<sup>50</sup> Finally, Jerry W. McCant, in the Family Law Quarterly, notes, "to state the matter bluntly, except for his financial contribution, the father is a 'disposable parent.'"<sup>51</sup>

The Task Force heard a considerable amount of testimony by fathers contesting their portrayal by our justice system as persons who are uncaring or uninterested in parental roles and responsibilities. Some judges simply do not realize that many fathers genuinely are, and desire to continue to be, actively involved in parenting. One father, engaged in a custody dispute with his wife concerning their son noted, "the fact that I had given my son a good home [while having custody for over one year prior to the decision] never seemed to carry a lot of weight."<sup>52</sup> The frustration which may arise from the perception that fathers are uninterested parents was reflected

in the testimony of one who asked “how do you tell a judge that you love your kids, that you don’t want to give them up? And how do you tell a judge that (he is) wrong without him throwing you in jail? How do you tell a judge that you can love your kids better than the mother can?”<sup>53</sup> As Jerry McCant again notes, “there is no longer any good reason to assume that mothers are parents while fathers are providers and thus nonparents... Many fathers are no longer willing to be nonparents in our culture. They want to be, and to be accepted as, nurturant parents.”<sup>54</sup>

K.S. Gersick, in **Divorce and Separation**, notes, “many fathers who desire custody report being actively discouraged from requesting custody by their attorneys.”<sup>55</sup> One father described this reality, stating, “During the last few years, I have come to understand the nightmare and indignities that fathers face. You have no idea the sense of despair that sets in when you are repeatedly told by lawyers that you have no chance of winning in court.”<sup>56</sup>

The perception of judges who responded to the judicial survey is that fair and serious consideration is always or usually given to fathers who seek primary custody, 81.1% vs. the 3.4% who responded seldom or never. Approximately six percent (6.8%) answered sometimes, thirteen percent said no basis for opinion. Judges also feel that custody awards are not in fact based on the assumption that children belong with their mothers. Approximately fifty-two percent (52.4%) responded seldom or never to this question while zero percent said always, fifteen percent said usually, 23.1 % said sometimes.

### **Perceptions of Unfairness Toward Mothers**

Besides reviewing claims of negative stereotypes or unfair perceptions that may affect a father in custody disputes, the Task Force heard testimony from mothers and advocates for mothers similarly alleging unfair treatment.

One of the most prevalent concerns identified by mothers and their advocates had to do with the awarding of custody to fathers on the basis of only a minimal amount of parental involvement. They claim that those awards often disregard or do not consider the primary caretaking role a mother might have performed. One attorney offered to the Task Force the example of a case involving a woman who, after acting as a full-time caretaker for her two children for fifteen years, was denied physical custody. Custody was instead awarded to the father who held two full-time jobs, one part-time job, and had little contact with the children.<sup>57</sup>

Another basis for the awarding of custody which is perceived of as unfair by mothers is the economic disparity existing between two parents. It was suggested to the Task Force that often when judges look to financial status or the presence of a stay-home mother to determine custody, the lower post-divorce economic status of the mother disadvantages her. Besides the fact that fulltime, year-round employed women earn substantially less, on the whole, than their male counterparts, their lower economic status may in part be aggravated by inequitable maintenance, property and child support awards. These economic disparities may then be further complicated when a woman attempts to balance a career and the duties of a responsible parent. The Task Force noted that women who place great emphasis on careers, whether because of ambition or economic necessity, are sometimes considered less fit to be awarded custody than men who place similar emphasis on their careers. One women’s advocacy group referred to this reality as a “catch 22 situation in the court”.<sup>58</sup>

Several mothers and their advocates also reported that women are held to a stricter standard of sexual activity than are men. In other words, some judges condemn a woman’s extra-marital and post-divorce social relationships, while ignoring or disregarding similar relationships held by a male. This double standard may negatively impact a woman in other related court disputes as well.



### **Custody Disputes Involving Allegations of Domestic Violence or Child Sexual Abuse**

Of particular concern to mothers, fathers and their advocates was the issue of custody disputes involving allegations of domestic violence or child sexual abuse. Violence and sexual abuse within the family unit are significant problems of major dimensions, yet their impact on custody decisions made in the “best interest” of the child frequently appears to be minimal. Despite the fact that domestic violence and child sexual abuse are crimes, some judges disregard expert testimony<sup>59</sup> and award custody to the alleged perpetrator. In some instances, an appropriate reaction to domestic violence on the part of the victim may result in denial of custody. The Task Force learned that women who respond to domestic violence by leaving the home may be perceived as unstable and less fit to receive custody. Since domestic violence and sexual abuse can adversely affect the mental and/or physical health of a child, judges who ignore or disregard such evidence in custody matters are overlooking information of serious importance to the child’s future.

There is an increase in the number of domestic violence and child sexual abuse allegations that are now being brought to the attention of the courts. Correspondingly, more men are stepping forward to dispute and challenge such accusations. The Task Force heard testimony from several fathers who allege that false claims of violence and sexual abuse were made against them as a means for the mother to gain custody of the child.<sup>60</sup> One witness testified that his wife made such allegations for fear that she would not receive custody of her children. In that instance, polygraph tests were utilized to prove that the allegations were fabricated.<sup>61</sup> In these cases, the mother “is guilty of psycho-sexually molesting her own children”.<sup>62</sup>

The Task Force also received reports concerned with case backlogs and time delays in the courts and their potentially adverse consequences on custody disputes involving child sexual abuse allegations. In these matters delay may pose a serious threat to the physical and mental well-being of a child needlessly exposed to further abuse. On the other hand, delay could also needlessly deny a father the right to unsupervised visitation and even custody.

### **VISITATION**

A report of the Friend of the Court Visitation Model Committee discusses the importance of maintaining parental visitation: “Visitation is considered important because it attempts to provide continuity with previous family life, maintain, repair, or create emotional ties, and encourage the continuance of parental responsibility other than the merely material (for which the support obligation is designed). It also may be designed to maintain a relationship beneficial to the child, such as that with grandparents or a particularly involved and significant third party.”<sup>63</sup>

Two problems affecting the ability of the non-custodial parent to exercise visitation with children were identified by the Task Force: The first is a perception that visitation orders are not given the same vigorous enforcement as are support orders. The onus and expense of enforcing visitation orders are placed on the parent who must pay attorney fees to file orders to show cause when the custodial parent refuses to allow visits. The courts may be reluctant to apply the sanction of jailing the non-complying parent because of concern about the need for care for the children in the home.<sup>64</sup>

The second problem is that the use of the term “liberal visitation” is subject to a restrictive interpretation by the custodial parent. One father testified that the prevailing attitude is that

“liberal visitation” means that mother can grant visits at her convenience.<sup>65</sup>

On the other hand, mothers testified that the father’s exercise of visitation—especially when children are picked up from her residence - become the occasion for renewal of the physical or verbal harassment which caused the breakdown of the marriage.’

Fathers also complained about the backlog in the Friend of the Court office affecting the ability to schedule show cause hearings, as authorized by statute, to obtain specific orders for make-up of denied visits.

In Wayne County, for example, referral of visitation problems to Friend of the Court counseling and mediation adds to delay in solving the problem because there is a 8-10 week backlog for appointments. Moreover, the mediation process does not result in an enforceable court order.

Respondents to the attorney survey confirmed a problem of ineffective court enforcement of visitation orders; 22% of male attorneys and 46% of female attorneys believe courts “seldom” or “never” effectively enforce visitation orders.

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**TABLE VI-6: ENFORCEMENT OF VISITATION**

Question: Courts effectively enforce visitation order.

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(n = 153)	Always & Usually	Sometimes	Seldom & Never	No Basis For Opinion
Female (n=77)	19% *	27%	46%	8%
Male (n=76)	29%	39%	22%	9%

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\* “Always” response = 0%

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However, respondents to the judicial survey had a markedly different perception; seventy-three percent believed that visitation orders are always or usually effectively enforced, while only 5.6% believed they were seldom or never enforced.

A separate problem raised by non-custodial fathers is that of allegations of sexual abuse made after unsupervised visits. When such an allegation is made, the court may immediately suspend visits without hearing the merits. Resources are not available without additional expense, usually to the father, for an objective evaluation of the truth or falsity of the claim. Crowded dockets results in

long delays between the time the charge is made and the time the court hears evidence to determine whether the claim is true. Fathers' rights groups argue that visitation should be continued on a supervised basis pending trial. Representatives of women's groups, however, believe that a father's visitation should be suspended pending investigation of alleged sexual abuse of a child.<sup>67</sup>

## **CONCLUSIONS**

### **General**

1. Fundamental attitudes about men and women, divorce and the role of judges and lawyers contribute to gender disparity in domestic relations cases.
2. The resolution of economic issues is often premised on misconceptions about the economic consequences of divorce for women.
3. The status and importance of domestic relations cases are not uniformly established in the minds of some judges and attorneys. In some instances, cases take too long, are unreasonably delayed, or are forced into settlement. The financially weaker party is often least able to afford an extended wait and most vulnerable to the increase in costs and fees created by the delay.
4. The Michigan appellate courts have failed to establish clear judicial direction on important domestic relations issues. There are few limits on trial court discretion and little guidance for judges on matters involving the lives and livelihood of men, women and children.

### **Alimony**

5. The manner in which alimony is determined and awarded profoundly affects the lives of the parties. Alimony is often not awarded when it should be or is awarded for too short a period of time and in inadequate amounts. This places women in a financially disadvantaged position after divorce. Older, long-term homemakers have little or no chance to become self-supporting at a standard of living commensurate with that enjoyed during the marriage. Divorce orders often provide for the automatic termination of alimony upon remarriage.
6. Enforcement of alimony orders is inadequate.
7. Some judges and attorneys fail to recognize a spouse's loss of career or career potential as a meaningful contribution to the economic partnership of the marriage.

### **Property**

8. Marriage is not consistently viewed by the courts and the bar as an economic partnership in matters related to the division of marital property. In some cases, the contribution of the homemaker/mother is not recognized as having provided an economic benefit to the marriage.
9. In order for a traditional 50/50 property split to be fair and equitable to both parties, it must take into account the wage-earner's profession or career as an asset arising out of the marriage.
10. In many cases, a non-earning spouse has little knowledge of what property the parties own, or its value, and has a difficult burden in discovering the nature and

extent of the marital estate. There are few meaningful adverse consequences to a party who hides or disposes of marital assets and thus avoids inclusion of such assets in the property award.

11. In some cases, a presumption exists that men should be awarded income producing assets and women the non-income producing assets, without adjusting for the added value of the available future income of the former or for the increased costs of maintenance and repair of the latter. This presumption may apply even where both parties have participated equally in the creation and operation of the business.
12. In some cases, a demand for custody of the minor children is used as a bargaining chip in property negotiations, often to the disadvantage of the woman who may voluntarily relinquish a claim to property in order to make sure that she receives custody of the children.

### **Child Support**

13. The failure to award adequate child support and to enforce child support orders causes significant economic hardships to children and their custodial parent (who is usually the mother).
14. Through the child support guidelines, Michigan has sought to address the appropriate level of support required, has established expedited procedures for immediate or temporary support, and provided for alternative collection methods.
15. Problems relating to child support are:
  - a. Awards frequently are inadequate and appear to be based on what the father can comfortably afford rather than the earlier standard of living of the children and their special needs. Child support guidelines are often viewed as a maximum and not merely as a guide. Some courts do not recognize the guidelines.
  - b. Women often have inadequate resources to retain counsel to assist in collecting awards.
  - c. In enforcement proceedings, repeated adjournments benefit the nonpaying parents and compromise the custodial parent's employment by necessitating numerous court appearances.
  - d. Resources allocated to the Friend of the Court are inadequate.

### **Child Custody**

16. Determinations of child custody are among the most important, difficult and demanding aspects of a judge's responsibility. In making such decisions, a judge should exercise his or her discretion based on the "best interest of the child" standard instead of stereotypes about the traditional roles of men and women as parents.

17. Stereotypes that influence some judges and that disadvantage fathers include:
  - a. Mothers are presumptively preferred as custodial parents, resulting in counsel's advice to fathers not to litigate custody because they have little chance of winning.
  - b. Some judges do not realize that some fathers genuinely are, and desire to continue to be, actively involved in parenting.
18. Stereotypes that influence some judges and that disadvantage mothers include:
  - a. Fathers who exhibit any interest in parenting should be granted custody despite years of primary caretaking by mothers.
  - b. Women who place great emphasis on careers, whether because of ambition or economic necessity, are sometimes considered less fit to be awarded custody than men who place a similar emphasis on their careers.
  - c. Women's extra-marital and post-divorce social relationships are sometimes judged by a stricter standard than are men's.
  - d. When judges look to financial status or the presence of a stay-home mother as a factor in deciding custody, the lower post-divorce economic status of women—caused in part by inequitable maintenance, property and child support awards—disadvantages the mother seeking custody.
  - e. Women forced to leave home to escape domestic violence may be viewed as unstable and less fit to receive custody
19. The adversarial nature of the divorce process makes contested decisions involving children difficult and counterproductive. Custody often becomes a bargaining chip to gain an advantage in negotiations over other issues.
20. The longer a custody battle takes the more disadvantage incurred by the non-custodial parent and the more difficult it is for the family.
21. Delay in deciding disputes which involve allegations of sexual abuse may result in unnecessary harm to the child and, in some cases, to the father.

## RECOMMENDATIONS

### **General**

1. Educational programs should train judges and lawyers to recognize the unfairness which can result from gender-based stereotypes in the domestic relations area. These training programs should emphasize the special importance of domestic relations litigation to the parties involved and to society. Such programs should explore fully the economic realities facing women after divorce.
2. Mechanisms should be created within the system which will assist a financially disadvantaged party in bearing the expenses of litigation.
3. The Michigan bar examination should include a domestic relations component. Law schools in Michigan should be encouraged to include information concerning not only the substantive law of domestic relations but also its economic and social consequences for men, women and children.
4. Domestic relations should be recognized by the judicial system and the practicing bar as a vital area of practice affecting a large number of litigants which requires expertise in substantive law and procedure and awareness of the psychological factors experienced by people in divorce.

### **Alimony**

5. The Supreme Court should establish a Task Force to develop statewide guidelines for alimony awards.
6. The Supreme Court should adopt rules and procedures to foster prompt enforcement of alimony awards.
7. Judges should impose meaningful sanctions for failure to comply with alimony orders.
8. Judges and attorneys should be trained in the economic consequences of divorce for men and women.

### **Property**

9. Judges and lawyers should be educated about the value and relevance of non-monetary contributions to a marriage in dividing the marital estate. Evidence should be introduced to establish the extent and value of such contributions.
10. In accordance with appellate decisions, the value of a career to which both parties have made contributions should be included as a marital asset and appropriately distributed.
11. Both parties should be required to disclose all assets in the early stages of a divorce action. Failure to disclose assets should result in the imposition of meaningful sanctions such as default, an award of actual attorney fees and costs or contempt. If undisclosed assets are later discovered, there should be a rebuttable presumption

that they were deliberately concealed, resulting in the award of 100% of such assets to the injured party unless the presumption is overcome by the non-disclosing party.

12. An economically disadvantaged party should be awarded attorney fees and costs early in the proceedings to allow for adequate preparation of the case.
13. There should be no presumption that income-producing assets of the parties should be awarded automatically to one or the other of the parties.

### **Child Support**

14. Training programs for lawyers, judges, and hearing officers should include:
  - a. current, accurate information about the costs of child raising, the costs and availability of child care and other data essential to making realistic child support awards;
  - b. identification of all available enforcement mechanisms under new and existing laws and stress on the importance of utilizing them to the fullest extent of the law; and
  - c. the child support guidelines.
15. The determination of child support should be made with special consideration given to:
  - a. alleviation of the disproportionate percentage of income contributed by divorced mothers and fathers to the support of their children, (e.g., husband's wages equal 80% of total family earnings, but he contributes 12% to 20% of his income to child support, while mother's wages equal 20% of total "family" earnings but she contribute 80% of her income to child support); and
  - b. application of the guidelines as a guide and not as a maximum standard, with the actual needs and prior standard of living of the child as the most important determining factors.
16. Legislation should permit the courts to impose an obligation on the non-custodial parent to share the cost of post high school education.
17. Greater resources should be allocated to the Friend of the Court system in order to secure prompt and effective enforcement of child support orders.
18. The Friend of the Court should periodically review child support orders to avoid the need for the custodial parent to raise issues of changed income.
19. Opportunities should be given outside of ordinary working hours for parents to confer with the Friend of the Court office personnel.



### **Child Custody**

20. Courts should use non-adversarial dispute resolution mechanisms such as conciliation and mediation to resolve custody disputes. Voluntary agreements with parents should be encouraged regarding major decisions concerning: education, enrichment activities, travel, medical problems, notice by the custodial parent of the whereabouts of the child and unlimited phone contact. However, such mechanisms should not be used in situations of domestic violence where unequal bargaining positions should be assumed.
21. Educational programs for judges should emphasize that the “best interest” of the child should specifically relate to the individual parenting ability of each party and not the societal role placed upon their gender.
22. Custody decisions should be expedited and should be separated from decisions on economic issues. Michigan Court Rule 3.206(F) directs that custody decisions be expedited. Trial courts should make every effort to comply with this rule. In order to ensure compliance, adequate Friend of the Court funding and staffing should be provided.
23. Where sexual abuse allegations are made, specific expedited time limits should be established and adhered to. Special training for judges concerning the underlying issues, as well as access to juvenile court resources and expertise, should be provided.
24. In any divorce proceeding or post-divorce proceeding where an allegation of child sexual abuse is made by one party against the other, the circuit court should refer the matter immediately to the probate court for prompt review and recommendation as to future custody and/or visitation of the minor children.

### **Visitation**

25. Uniform standards and guidelines for frequency and duration should be established when parents are unable amicably to establish visitation arrangements.
26. Visitation and child support should be treated as separate issues.
27. Clear and consistent methods for enforcement of orders consistent with the best interest of the children should be adopted statewide.
28. Meaningful consequences for violation and/or interference with visitation orders should be imposed on the offending parent.
29. Judges and prosecutors should encourage the procedures outlined in the Support and Visitation Enforcement Act, which permits the injured party to bring the issue to the attention of the Friend of the Court and/or judge in pro per.
30. Mediation projects such as the Clinton County Mediation/Consultation Project should be studied to determine whether changes in legislation or court rules are needed.

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